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No. 03-9046

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES, *Petitioner,*

v.

DOUGLAS WEBER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, PENNSYLVANIA, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May a federal court stay and hold in abeyance a "mixed" 28 U.S.C. § 2254 petition containing both exhausted and unexhausted claims — rather than dismiss it — to avoid the § 2244 statute of limitations while the petitioner returns again to state court to litigate the unexhausted claims?

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INTEREST OF AMICI

Amici States have a compelling obligation to protect the finality of judgments rendered in their criminal courts. The undoing of this finality in federal habeas corpus proceedings undermines public safety, deterrence of crime, retribution, and effective rehabilitation; and the passage of time increases the risk of unfairness and inaccuracy in any later re-trial of the criminal case. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted reforms that provide enhanced protections for finality, including a statute of limitations for the presentation of habeas corpus claims challenging state convictions. The "stay and abeyance" device urged by petitioner presents a grave threat to those reforms.

SUMMARY OF ARGUMENT

This Court has long held that district courts must dismiss habeas petitions containing both exhausted and unexhausted claims. *Rose* v. *Lundy*, 455 U.S. 509, 522 (1981); see also *Duncan* v. *Walker*, 533 U.S. 167, 178-79 (2001). Most recently, in *Pliler* v. *Ford*, 124 S. Ct. 2441, 2445 (2004), a majority of this Court confirmed the applicability of *Rose* v. *Lundy* to post-AEDPA cases, again emphasizing that "federal district courts must dismiss mixed habeas petitions[.]"

Petitioner Rhines advocates a stay and abeyance procedure for mixed habeas petitions that is inimical to both *Rose* v. *Lundy* and AEDPA. Under stay and abeyance, a mixed petition may be filed, complete dismissal avoided, unexhausted claims dismissed (or, in some circuits, retained, in further contravention of *Rose* v. *Lundy*), and a stay of federal proceedings obtained for the purpose of allowing the petitioner to return yet again to state court in order to present his unexhausted claims there. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to "relate back" to the original petition, even though they otherwise would be time-barred under 28 U.S.C. § 2244. This procedure, however, is contrary to the *Rose* v. *Lundy* exhaustion rule, as re-affirmed in AEDPA. And it is contrary to AEDPA's adoption of a limitations period that is tolled "for the pursuit of state remedies [but] not during the pendency of applications for federal review * * * ." *Duncan* v. *Walker*, 533 U.S. at 180.

Stay and abeyance also undermines AEDPA's increased protections for finality "by creating more potential for delay in the adjudication of federal law claims." See *Duncan* v. *Walker*, 533 U.S. at 180. Further, stay and abeyance encourages the filing of mixed petitions and the subsequent addition of newly-exhausted but time-barred claims; it thus "increases the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180; *Slayton* v. *Smith*, 404 U.S. 53 (1971) (*per curiam*) (disapproving the use of stay and abeyance in federal habeas proceedings).

Stay and abeyance presents an even greater potential for abuse in capital federal habeas cases like this one, where the incentive to "obtain[] speedy federal relief," *Rose* v. *Lundy*, 455 U.S. at 520 (plurality op.), is largely absent. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, * * * and 'to further the principles of comity, finality, and federalism' * * * ") (quoting *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000)).

With its attendant delay of federal proceedings, stay and abeyance is inconsistent with this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817-18 (1976). In addition, it "fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan* v. *Walker*, 533 U.S. at 181 (citing 28 U.S.C. §§ 2254(b), 2254(e)(2), & 2264(a)). If permitted by this Court, stay and abeyance would reduce district courts to what one lower court has described as "a jurisdictional parking lot." *Sterling* v. *Scott*, 57 F.3d 451, 454 (CA5 1995).

ARGUMENT

I.

THE STAY AND ABEYANCE OF MIXED HABEAS PETITIONS CONTRAVENES AEDPA'S RE-AFFIRMATION OF *ROSE* v. *LUNDY*

1. For over twenty years, this Court has unwaveringly held that "a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief." *Rose* v. *Lundy*, 455 U.S. at 522; see also *id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille* v. *Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague* v. *Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, * * * the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle* v. *Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose* v. *Lundy*, * * * would mandate dismissal of the entire petition").

In *Pliler* v. *Ford*, 124 S. Ct. at 2441, this Court applied the principles set forth in *Rose* v. *Lundy* to a post-AEDPA case and reiterated that "federal district courts must dismiss mixed habeas petitions[.]" *Id.* at 2445. As the Court observed in *Duncan* v. *Walker*, 533 U.S. at 167, AEDPA's exhaustion requirement "ensur[es] that the state courts have the opportunity fully to consider federal-law challenges to a

state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79.

The dismissal of a mixed petition, however, is not without consequences:

> * * * The combined effect of *Rose* and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims — including those already exhausted — because the limitations period could expire during the time a petitioner returns to state court to exhaust his unexhausted claims.

Pliler v. *Ford*, 124 S. Ct. at 2445.

Yet that is precisely what Congress contemplated in incorporating the statutory exhaustion requirement interpreted by this Court in *Rose* v. *Lundy*. Stay and abeyance, on the other hand, in effect tolls the AEDPA limitation period during the pendency of a federal habeas petition — in direct contravention of *Duncan* v. *Walker* — and "create[s] more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves." See *id.* at 180. As this Court observed in *Duncan*, "We do not believe that Congress designed the statute in this manner." *Id.* at 180.

Under stay and abeyance as it is practiced in most jurisdictions, a mixed federal habeas petition may be filed, unexhausted claims dismissed (or retained, as in the Third and Seventh Circuits), and a stay of the proceeding obtained for the purpose of allowing the petitioner yet another opportunity to exhaust those dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to

relate back to the original petition, even where exhaustion was commenced *after* the expiration of AEDPA's limitation period. See, e.g., *Crews* v. *Horn*, 360 F.3d 146, 152 (CA3 2004); *Nowaczyk* v. *Warden*, 299 F.3d 69, 79 (CA1 2002); *Palmer* v. *Carlton*, 276 F.3d 777, 781 (CA6 2002); *James* v. *Pliler*, 269 F.3d 1124, 1126-27 (CA9 2001); *Zarvela* v. *Artuz*, 254 F.3d 374, 381 (CA2 2001); *Freeman* v. *Page*, 208 F.3d 572, 577 (CA7 2000); *Brewer* v. *Johnson*, 139 F.3d 491, 493 (CA5 1998).[1/]

Stay and abeyance thus runs afoul of this Court's pronouncements that AEDPA's limitation period is tolled only during "the pursuit of state remedies *and not during the pendency of applications for federal review* * * *." *Duncan* v. *Walker*, 533 U.S. at 180 (emphasis added).

2. The requirement that a habeas petitioner exhaust his remedies prior to seeking relief in federal court is a long-standing mandate, founded upon principles of federalism and comity, and designed to ensure the prompt resolution of properly-brought claims. See *Rose* v. *Lundy*, 455 U.S. at 515 ("The exhaustion doctrine existed long before its codification by Congress in 1948"). In *Rose* v. *Lundy*, 455 U.S. at 509, this Court noted that the prior version of 28 U.S.C. § 2254 "expressly require[d] the prisoner to exhaust 'the remedies available in the courts of the State,'" *id.* at 519, and that, consequently, "a district court must dismiss habeas petitions

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1. Rhines states that, "[w]ith the exception of the United States Court of Appeals for the Eighth Circuit, every court of appeals that has resolved this issue has determined that staying a federal petition while state court proceedings are completed" is an appropriate means of complying with the dictates of *Rose* v. *Lundy*, while at the same time avoiding the application of the AEDPA limitation period. Pet'r Br. 9-10. A numerical majority, however, does not ensure that the practice at issue is correct. As this Court noted in *Rose*, only two courts of appeals at that time insisted on total exhaustion; the rest "permitted the District Courts to review the exhausted claims in a mixed petition containing both exhausted and unexhausted claims." *Rose* v. *Lundy*, 455 U.S. at 513 n.5.

containing both unexhausted and exhausted claims." *Id.* at 522. In addressing the lower court's failure to enforce that requirement, this Court stated:

> * * * [O]ur holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions * * *, or will serve to "trap the unwary *pro se* prisoner." * * * On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. * * *
>
> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piece-meal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

Id. at 519-20.

A plurality nevertheless recognized that a total exhaustion rule could result in the foreclosure of certain legal options: "[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Rose* v. *Lundy*, 455 U.S. at 520-21 (plurality op.).

AEDPA retains the exhaustion requirement of its predecessor statute. Under 28 U.S.C. § 2254(b)(1)(A), habeas relief is likewise prohibited unless "the applicant has exhausted the remedies available in the courts of the State * * * ." AEDPA departs from prior habeas jurisprudence, however, by imposing a one-year limitation period under § 2244(d)(1) to "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling of the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * ."

In *Duncan* v. *Walker*, this Court explained:

> * * * The exhaustion rule promotes comity in that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" * * *
>
> The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. * * * This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.
>
> * * * *
>
> By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. * * *

Duncan v. *Walker*, 533 U.S. at 179-80.

Subsequently, in *Pliler* v. *Ford*, this Court emphasized that dismissal of mixed petitions *remains* the only proper course of action under *Rose* v. *Lundy*, notwithstanding AEDPA's newly-imposed limitation period. *Pliler* v. *Ford*, 124 S. Ct. at 2445. Indeed, because *Rose* v. *Lundy* was decided in 1981, and because AEDPA — which was enacted in 1996 — retains the statutory exhaustion requirement interpreted by that decision, Congress presumably intended *Rose* v. *Lundy* to apply to post-AEDPA cases. See *Williams* v. *Taylor*, 529 U.S. at 434 ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary"); see also *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here * * * Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *United States* v. *Sisson*, 399 U.S. 267, 297-98 (1970) ("[T]he axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed").

Moreover, the "design" of AEDPA, *Duncan* v. *Walker*, 533 U.S. at 180, is dependent upon *Rose* v. *Lundy*'s total exhaustion rule. See 141 Cong. Rec. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[T]his bill does not abolish [the] exhaustion requirement. Unli[k]e the resolution of this issue in the 1990 legislation, which passed the Senate, which eliminated the requirement of exhaustion of State remedies, that provision is not in this bill").

Rhines nevertheless argues that "[n]othing in * * * AEDPA prohibits a court from staying the exhausted claims of a mixed petition to allow a habeas petitioner to present

unexhausted claims to state court." Pet'r Br. 7. Not so. In *Slayton* v. *Smith*, 404 U.S. 53 (1971) (*per curiam*), a case that pre-dates *Rose* v. *Lundy*, this Court rejected the lower court's stay of a mixed habeas petition pending exhaustion of state remedies:

> * * * [A]bsent special circumstances, cf. *Nelson* v. *George*, 399 U.S. 224 (1970), *Wade* v. *Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54; see also *id.* (remanding for further proceedings consistent with the opinion).

More recently, in *In re Blodgett*, 502 U.S. 236 (1992) (*per curiam*), this Court chastised a court of appeals over its lengthy stay of a federal habeas proceeding:

> * * * The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose* v. *Lundy*.

Id. at 239.

In drafting AEDPA, Congress presumably was aware of this Court's disapproval of stays of habeas proceedings. See *Williams* v. *Taylor*, 529 U.S. at 434. The fact that Congress did not create a "laundry list" of prohibited practices may not be regarded as tacit agreement with a procedure that has been

repeatedly rejected by this Court and that, as previously argued, would be inconsistent with AEDPA's statutory design. Cf. *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute").

Rhines argues that federal courts have "inherent" authority to stay federal actions in favor of parallel state proceedings to enable the federal actions to proceed without the risk of a time bar. Pet'r Br. 12. But the decisions relied upon by Rhines — *Wilton* v. *Seven Falls Co.*, 515 U.S. 277 (1995), and *Deakins* v. *Monaghan*, 484 U.S. 193 (1988) — involved *non-habeas proceedings* (actions for declaratory relief, and for damages and attorney's fees, respectively), where *dismissals* of the federal actions were contemplated upon resolution of the pending state-court actions. Stays of the federal actions were available merely to ensure that the federal actions would go forward in the event "the state case[s], for any reason, fail[ed] to resolve the matter[s] in controversy." *Wilton* v. *Seven Falls Co.*, 515 U.S. at 288 n.2. And, neither case was subject to exhaustion of state-court remedies as a pre-condition to filing in federal court.

Rhines also points to an almost decade-old study that suggests approximately fifty-seven percent of federal habeas petitions "are dismissed as containing unexhausted claims." Pet'r Br. 8, 26; see also *Pliler* v. *Ford*, 124 S. Ct. at 2450 (Breyer, J., dissenting); *Duncan* v. *Walker*, 533 U.S. at 186 (Breyer, J., dissenting). Aside from the fact that, as Rhines acknowledges, the study "apparently has not been updated," see Pet'r Br. 26 n.6, and thus may not reflect current trends, exhaustion is not a particularly difficult concept for a habeas petitioner to grasp. As this Court noted over twenty years ago:

> * * * §§ 2254(b), (c) provide[] a simple and clear instruction to potential litigants: before you

> bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement.

Rose v. *Lundy*, 455 U.S. at 520. Petitioner's cited study suggests, if anything, that habeas corpus petitioners have been too cavalier about the important federalism interests that support the total-exhaustion rule.

AEDPA re-affirms the importance of those interests and of that rule. AEDPA encourages the filing of exhausted federal habeas petitions by tolling the limitation period for properly-filed state petitions. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Duncan* v. *Walker*, 533 U.S. at 181 (emphasis in original). The application of stay and abeyance would be "out of step with this design," "result[ing] in "[a] diminution of statutory incentives to proceed first in state court[, and] * * * the risk of the very piece-meal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180.

The possibility that a refiled petition might be time-barred does not dictate a contrary result.[2/] Congress has afforded petitioners ample time — one year after the finality of their state-court convictions — to exhaust their claims

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2. The Eighth Circuit has suggested that a petitioner might avoid that consequence by simultaneously filing a "protective" petition in state court containing claims that may be unexhausted. See *Akins* v. *Kenney*, 341 F.3d 681, 685-86 (CA8 2003). Under § 2244(d)(2), the state-court filing would toll AEDPA's limitation period, thereby allowing the petitioner to refile in federal court in the event his initial federal petition is dismissed as unexhausted. See *id.*

before filing a federal habeas petition. The limitation period may be delayed further under § 2244(d) and, as noted, may also be tolled during the pendency of state habeas corpus proceedings. But Congress has made it clear that "[s]ection 2244(d)(2) * * * [does] not toll the limitation period during the pendency of * * * [a] federal habeas petition." *Duncan* v. *Walker*, 533 U.S. at 181-82; cf. *Rose* v. *Lundy*, 455 U.S. at 520 (plurality op.) ("By invoking this procedure [dismissal of unexhausted claims], * * * the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. * * * Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions").

Indeed, *Rose* v. *Lundy* appears to recognize that a total exhaustion rule will not "unreasonably impair the [petitioner's] right to relief," 455 U.S. at 522, as long as the petitioner is allowed to *re-file* his claims following the dismissal of a mixed petition. But *Rose* cannot be read as *requiring* the consideration of re-filed claims on the *merits*. Even before the enactment of AEDPA, re-filed claims could be summarily denied in federal court where, for example, the claims had been procedurally defaulted in state court on "independent and adequate" state-law grounds. See, e.g., *Coleman* v. *Thompson*, 501 U.S. at 731-32; *Castille* v. *Peoples*, 489 U.S. at 351-52; *Wainwright* v. *Sykes*, 433 U.S. 72, 81, 87 (1977); see also *Rose* v. *Lundy*, 455 U.S. at 521 (plurality opn.) ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"); cf. *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (allowing relief from procedural default based upon a showing of cause and prejudice); 28 U.S.C. § 2244(b)(2).

In addition, and contrary to Rhines's contention, AEDPA's limitation period, coupled with the total exhaustion requirement of *Rose v. Lundy*, does not constitute an

"unreasonab[e] impair[ment]" of a petitioner's right to relief. AEDPA does not impose a "blanket" restriction on a petitioner's ability to have his claim heard on the merits; instead, AEDPA recognizes that timeliness involves a "fact-intensive task," see *Pliler* v. *Ford*, 124 S. Ct. at 2446, which requires a case-by-case analysis of the applicability of statutory defenses to the limitation period. See 28 U.S.C. § 2244(d)(1).

Would-be federal habeas petitioners have one year from the date of finality of their state-court convictions (following at least one round of appeals in most instances) to file their federal habeas petitions. That one-year period may be further extended during the pendency of state post-conviction collateral challenges, which serve the dual purpose of tolling AEDPA's limitation period and exhausting previously-unpresented claims. See 28 U.S.C. § 2244(d)(2). Thus, there is simply no excuse for a petitioner's failure to comply with the requirements of *Rose* v. *Lundy* even in this "post-AEDPA world." See *Duncan* v. *Walker*, 533 U.S. at 182 (Stevens, J., concurring).

3. It may be argued, as suggested by the plurality in *Rose* v. *Lundy*, that unexhausted claims should be deleted from a mixed petition in lieu of complete dismissal. See 455 U.S. at 520-21 (plurality op.). But, even if such "purging" were authorized, the stay and abeyance of remaining claims would have the untoward effect of placing the federal habeas proceeding "on hold" indefinitely pending a petitioner's pursuit of state-court remedies. See *In re Blodgett*, 502 U.S. at 239.

Stay and abeyance frustrates *Rose* v. *Lundy* in other ways. Although *Rose* contemplated outright dismissal of a mixed petition, or perhaps the litigation of a petition purged of unexhausted claims, stay and abeyance encourages the filing of mixed petitions and eschews dismissal without obtaining the benefit of expeditious federal review of the exhausted claims. Indeed, the *Rose* plurality anticipated that

purged petitions would be resolved without delay, in warning that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions" under Rule 9(b) of the rules Governing Section 2254 Cases. 455 U.S. at 521. In contrast, under stay and abeyance, the federal proceeding is "held hostage" in favor of unexhausted claims that, under *Rose* v. *Lundy*, should play no role in federal review.

II.

THE STAY AND ABEYANCE OF MIXED HABEAS PETITIONS WOULD EVISCERATE AEDPA'S LIMITATION PERIOD

1. Stay and abeyance is also contrary to the limitation period of AEDPA, which likewise contemplates the expeditious resolution of habeas claims. As set forth previously, 28 U.S.C. § 2244(d)(1) imposes a one-year limitation period for "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * ." Section 2244, as explained in *Duncan* v. *Walker*, does not allow tolling of the limitation period during the pendency of a federal petition. 533 U.S. at 181-82. Stay and abeyance, however, illegitimately affords such tolling by other means.

The practice of stay and abeyance is designed to bypass the limitation period of AEDPA, which "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan* v. *Walker*, 533 U.S. at 179 (citing *Calderon* v. *Thompson*, 523 U.S. 538, 555-56 (1998)). As such, stay and abeyance "undermine[s] the interest in finality

by creating more potential for delay in the adjudication of federal law claims." *Duncan* v. *Walker*, 533 U.S. at 180. Indeed, it "increase[s] the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.*; see also *Carey* v. *Saffold*, 536 U.S. 214, 226 (2002) (discussing AEDPA's "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims"). No purpose is served by a stay of federal habeas proceedings except to defy Congressional intent and subvert AEDPA's limitation period. Any stay of federal habeas proceedings to allow petitioners to exhaust their state remedies would unduly delay the ultimate determination of the issues and reward those, like Rhines, who disregard the plain language of AEDPA and needlessly file mixed petitions.

As set forth previously, this Court long ago disapproved of the practice of stay and abeyance in habeas proceedings. In *Slayton* v. *Smith*, 404 U.S. at 53, the district court summarily dismissed a mixed petition. On appeal, the Fourth Circuit agreed that state remedies had not been exhausted, but vacated the district court's judgment and remanded for further proceedings with instructions to stay the case until the petitioner had sought relief in state court. *Id.* In rejecting that procedure, this Court held:

> The Court of Appeals' form of "abstention" is perhaps technically consistent with the statutory prohibition against issuing the writ where state remedies have not been exhausted. 28 U.S.C. § 2254. But, having determined that state remedies had not been exhausted, the Court of Appeals would have better served the policy of the statute had it avoided any implication as to the merits of so delicate a subject. Further, absent special circumstances, cf. *Nelson* v. *George*, 399 U.S. 224 (1970), *Wade* v. *Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54.

2. Stay and abeyance has an even greater potential for abuse in capital federal habeas cases like this one, where the incentive to "obtain[] speedy federal relief," *Rose* v. *Lundy*, 455 U.S. at 520 (plurality op.), is largely absent. See *Woodford* v. *Garceau*, 538 U.S. at 206 ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, * * * and 'to further the principles of comity, finality, and federalism' * * * ") (quoting *Williams* v. *Taylor*, 529 U.S. at 436); cf. 141 Cong. Rec. S7804 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[I]n the current context in which habeas corpus appeals now run for as long as a couple of decades, the deterrent effect of capital punishment has been virtually eliminated").

For example, in *Reno* v. *Woodford*, CV 96-2768, a capital federal habeas case currently pending in the Central District of California, the district court issued a stay of the federal habeas proceeding on May 7, 1999, ostensibly to permit the petitioner to file his unexhausted claims in the California Supreme Court. Almost *five years* passed before a state-court exhaustion petition was eventually filed on May 6, 2004. That petition will now require the state court to re-familiarize itself with a voluminous court file and resolve newly-raised claims, *eight years* after it last decided the case. See *People* v. *Memro*, 11 Cal. 4th 786 (1995), modified, 12 Cal. 4th 783D (1996). Although *Reno* represents a somewhat unusual example, multi-year delays have been experienced in other capital habeas cases filed in federal courts in California, as well as in the other amici states.

The potential for abuse, moreover, is not limited to capital federal habeas cases. Regardless of the petitioner's intent or purpose, stay and abeyance necessarily results in the suspension of *any* federal habeas proceeding pending the exhaustion of claims in state court. And, as this Court observed in *Pliler* v. *Ford*, 124 S. Ct. at 2446, "it is certainly the case that not every litigant seeks to maximize judicial process." In fact, under stay and abeyance, habeas petitioners have been allowed to file "serial" state-court exhaustion petitions, suspend their federal proceedings virtually at will, and to resume their federal collateral challenges with newly-exhausted (but time-barred) claims.

Stay and abeyance thus contravenes this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. at 817-18; see also *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. at 239-40. Stay and abeyance, if given the imprimatur of this Court, would render AEDPA's limitation period virtually irrelevant, and reduce district courts to what one appellate court has aptly described as "a jurisdictional parking lot." *Sterling* v. *Scott*, 57 F.3d at 454.

CONCLUSION

For these reasons, the judgment of the Eighth Circuit should be affirmed.

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